O. Hoarding an
P. Ordinance
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1946 **File No.** 46

Legax Department

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Subject:— Hoarding and Prevention of Profiteering Ordinance

Opinion under the

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File No. O. Hoarding and P. Ordinance

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C O N T E N T S.

Legal Department File No. O.Hoarding and Prev. of Profitg. Ordinance/1946.

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Mr. D.C.Munsiff, the Police Prosecutor in his report states that the validity of sanctions which were until recently issued in the form of resolutions made by the Government of Bombay and signed by Dr.Shirname in virtue of the power conferred upon him in pursuance of rule 13 of the Rules of Business was never called in question since they were granted by the Provincial Government and Dr.Shirname merely authenticated them on behalf of Government but the recent sanctions signed by Mr. Shah and Mr.Booth, Joint Secretaries to the Government of Bombay, evidence a departure from the form previously adopted and followed. Referring to the recent judgment of the Bombay High Court in C.R.A.No.191 of 1945 he states that it is open to question whether the Provincial Government can validly empower the Joint Secretaries to grant sanctions under section 14 of the Hoarding and Profiteering Prevention Ordinance and clause 16 of the Drug Control Order. The Additional D.C.S.(Enfl) states that the recent procedure adopted in the matter of sanctioning prosecutions was followed on the advice of the R.L.A. in his opinion No.6109 dated 18-8-1945 and that therefore the R.L.A. may advise on the point raised by the Police Prosecuter.

2. In Sardarilal Vaid v. Imp. in C.R.A.No.184 of 195 where a similar question arose the High Court observed as follows :-

> "The sanction was given by the Deputy Controller General of Civil Supplies and the learned Magistrate in dealing with this point states that this officer is placed above the District Magistrate in the warrant in the warrant of Precedence. This warrant is generally regarded as a Warrant of Precedence only but the preamble of the warrant shows quite clearly that it is determinative of rank, and we can see nothing to justify the suggestion that an officer contemplated by section 14 of the Ordinance must necessarily be an officer exercising judicial powers."

The judgment was delivered by Weston J. and Bavdekar J. on 26-6-1945. Relying on this decision of the Bombay High Court the R.L.A. in his opinion No.6109 dated 18th August 1945 advised the Government that if the Joint Secretaries to Government in Finance Department (Supply) and Directors of Civil Supplies were not below the rank of a Deputy Commissioner, there would be no legal objection to Government empowering them to accord sanction to prosecutions under section 14 of the Hoarding and Profiteering Prevention Ordinance and on such empowerment those officers would be competent to sanction prosecutions for offences under

nder the Ordinance. In pursuance of this opinion F.D. by its notifications No.367/IV dated 20-10-1945 and No.638/IV dated 20-10-1945 had empowered the Joint Secretaries in F.D.(Supply) and the Directors of Civil Supplies, Bombay, to sanction prosecutions for offences within the limits of the City of Bombay punishable under this Ordinance and also under the Drugs Control Order. In the case of Purshottam Harijivan Shah v. Imperator in C.R.A No.191 of 1945, when a similar point was raised before the Bombay High Court, Divatia J. held as follows :-

"The sanction Ex. H in this case is signed by Mr.S.N.Mehta, Deputy Controller General of Civil Supplies and it purports to be issued under section 14 of the Hoarding Profiteering Prevention Ordinance read with Government of India Notification No.F.22(7)C.S.(C)/43 dated the 19th February 1944. This notification empowers the Controller General of Civil Supplies to grant sanction in respect of any effence committed under the Ordinance in any province in British India and among other officers the Dy.Controller Genl.of Civil Supplies (Wester Region), Bombay, is empowered to grant sanction in respect of any such offence committed in the Provinces of Bombay, Madras, etc. Under section 14 no prosecution for any offence punishable under the Ordinance shall be instituted except it the previous sanction of the Central or the Provincial Government, or of an officer not below the rank of a District Magistrate empowered by the Central or the Provincial Government to grant such sanction. It is clear therefore that the sanction can be granted by three authorities, firstly the Central Government, secondly, the Provincial Government and thirdly, by any officer not below the rank of a District Magistrate empowered by the Central or the Provincial Government. In this case the sanction cannot be deemed to have been given either by the Central Government or the Provincial Government because it purports to have been granted under the terms of the notification by which certain classes of officers are specially empowered under the last part of the sanction. The question therefore is whether the Deputy Controller General whoever may be the person holding that post - is an officer not below the rank of a District Magistrate. The notification itself is silent on the question as to whether these particular officers are holding such a rank. So also the definition of "Controller General" in section 2(a) of the Ordinance is silent as to such rank. It merely says that "Controller General" means the Controller General of Civil Supplies appointed by the Central Government and includes the Deputy Controller General or Assistant Controller General of Civil Supplies so appointed.

It is the contention on behalf of the petitioners that a District Magistrate is a creature of the Criminal Procedure Code and apart from that Code there is no test to find out whether any person is an officer not below the rank of a District Magistrate. There is nothing in the Code to determine the rank of Deputy Controller General in the Hierachy of Magistrates. These officers are also not invested with powers as District Magistrate under the notification, and it is therefore urged that the notification is illegal and ultra vires. We think there is considerable force in this contention. Under section 10 of the Criminal Procedure Code in every district outside a presidency town a first class Magistrate may be appointed by the local Government as a District Magistrate for a particular district. Section 11 says that any officer who is in charge of the chief executive administration of a district shall have all the powers of the District Magistrate. There is no provision of law pointed out to us or which we have been able to find other than the Criminal Procedure Code which creates either the powers or the rank of a District Magistrate .....In the present case the act required to be proved is the empowering of an officer not below the rank of a District Magistrate to grant sanction. It must be proved by the prosecution that the officer empowered held a rank not below that of a District Magistrate. No such proff has been given. Such a rank, as I said before, has not been created either in the definition of the Controller General or in section 14 itself. Assuming that the rank of a District Magistrate can be created without investment of powers of a District Magistrate, it must be created lawfully before the empowerment can take place. A rank may be created or recognised statutorily, as for example in section 14, section 166 and section 167 of the Criminal Procedure Code and section 35 of the Bombay Civil Courts Act. The term "rank as used in sec.14 does not in our opinion mean social in the warrant of precedence. As the prosecution has not thus proved that the officers mentioned in the notification hold a rank not below that of a

of a District Magistrate, the notification issued by the Government is in our opinion invalid and ultra vires, with the result that the sanction is also of the same nature."

This judgment and judgments in Criminal Appeals No.326 of 1945,280 of 1945 and 240 of 1945 were delivered by Divatia J and Rajadhyaksha J. but in Criminal Appeals 106 of 1945 and 198 of 1945 the Bench consisted of Divatia J. and Bavdekar J. who had taken a different view in the case of Sadarilal Vaid v. Imperator C.R.A.184/45. In view of these later ruling it appears that the Joint Secretaries and the Director of Civil Supplies cannot be empowered under section 14 of the Hoarding and Profiteering Prevention Ordinance, 1943 to sanction prosecution for offence within the limits of the city of Bombay, punishable under the said Ordinance. Now can they be so empowered to sanction prosecutions under the Drugs Control Order. Consequently the Notification Nos.367/IV and 638/IV dated 20-10-45 issued by F.D.(Supply) will have to be cancelled and the Joint Secretaries and the Director of Civil Supplies empowered under rule 13 of the Rules of Business to authenticate orders sanctioning prosecutions under section 14 of the Hoarding and Profiteering Prevention Ordinance and clause 16 of the Drugs Control Order. To tide over the difficulty created by the High Court decision, the only feasible course is to amend the above mentioned Ordinance and Order.

Sd/- P.N.M.

Remembrancer of Legal Affairs.

U.R. to F.D. (Supply) No.40-Confl., dated the 23rd January 1946.

SNT/1

R.I.No.45-Confl., dated 31-1-46.

Submitted.

2. Plsee R.L.A.'s opinion No.40-Confl., dated 23-1-1945 and F.D.(Supply) note at pp. 19-23 ante. In this opinion F.D.(S). was requested to cancel notifications No.367/IV and 638/IV dated 20-10-1945 and empower the Joint Secretaries and the Director of Civil Supplies under rule 13 of the Rules of Business to authentic orders sanctoning prosecutions under sec. 14 of the Hoarding and Profiteering Prevention Ordinance, and clause 16 of the Drugs Control Order. That Deptt. was also requested to approach the Govt. of India for amendment of the Ordinance and the Order to tide over the difficulties created by the High Court decision in the case of Purshottam Harihivan Bhat v. Emp-in C.R.A No.191 of 1945. F.D.(S) states that the Joint Secretary to Government in F.D. has noe been authorised to sign orders under Rule 12 of the Rules of Business. That Deptt. is therefore not inclined to approach the Govt. of India and before taking up the matter with them the papers are referre to the R,L.A. with a request to advise if the following procedure (at H on pp 23 ante) would meet the requirements of the provisions of the Ordinance and the order

(i) these sanctions may be accorded in the form of a resolution (by giving brief facts of the cases in the preamble to resolution.)

(ii) They may be signed by any Joint Secretary to Government in that Department as :

By order of the Governor of Bombay,

Joint Secretary to Govt.

If the above procedure is approved, F.D.(S) proposes to cancel the notifications 367/IV 638/IV, dated 20-10-1945 and to issue orders for withdrawal of cases in which sanctions are accorded by the Joint Secretary in exercise of the powers delegated under aforesaid notifications and file fresh charges sheets in

sueets in respect of these cases after sanction is given on the lines stated above (The D.C.S.(G) ventures to think that for the purposes of sec.14 of the Ordinance any officer functioning or exercising the powers of the Provincial Government can authorise the Prosecution.

SNT/30.7.

Office of the R.L.A.

The procedure stated at 'H' of Finance Dgpartment((Supply) note dated 29-1-1946 is correct and there is no objection to following it.

Sd/- P.M.M.

Remembrancer of Legal Affairs

U.R. to F.D.(Supply), No.-56 -Confl. dated the 5th February 1946.

SNT/10.7.

Office of the R.L.A.

The question for consideration are :-

(1) Whether the Hoarding and Profiteering Prevention Ordinance, 1943, binds the Crown; and

(2) If it binds the Crown whether under section 13 of the ordinance a prosecution can be launched against the Officer Commanding, Depot No.4, or Messrs. Bennet & Coy. for contracention of the provisions of section 4.

As to the first question, it is a well established rule of construction that in construing statues, the Crown is not bound by a status unless it appears on the face of the Status that the Crown is included therein (Attorney-General for New South Wales v. Curator of Intestate Estates, (1917) A.C.519 at 523). The principle isthat it is inferred prima facie that the law made by the Crown with the assent of Parliament is made for subjects, and not for the Crown (Attorney General v. Donaldson 10 M & W 117 at p.124) "So far as the Commonwealth and State legislation is concerned, the modern sense of the abovementioned rule is that the executive Government of the Commonwealth or of a State is not bound by a statue unless the intention that it shall be bound is apparent" (cf Roberts Abern, 1933, I.C.L.R. at p.417; Kerr's Law of Australian Constitution p.221) (cf.R.L.A.'s opinion No.5775 dated 21-8-1946) A Statute may contain certain provisions by which the Crown never would be bound unless that were clearly expressed such, for instance as the provisions of a taxing Statute, or certain enactments with penal clauses adjected, (See Edinburgh Magistrates v. Lord Advocate, 1912, S.C.1085) Generally speaking when the words used in an Act of Parliament are "person or persons" the Crown is not bound (See R.V. Duffy. 1849, 1 Ir Jur 81).

The rule of construction according to which the Crown is not affected by a Statute unless expressly named in it applies to India (see S. of S. for India v. Mathurabai 14 Bom. 413 followed in Hiranand Kripalani v. Secretary of Stat

36 Bom. L.R.820). The Crown is not expressly named in the Hoarding and Profiteering Prevention Ordinance, 1943, To determine whether the Crown is bound by necessary implication, it is necessary to examine the provisions and the nature of the Ordinance.

The object of the Hoarding and Profiteering Prevention Ordinance, 1943, as stated in the preamble is "to provide for the prevention of hoarding and profiteering". Clause (b) of section 2 define "dealer" as meaning a person carrying on business of selling any article, whether wholesale or retail. The phrase "carrying on business" implies a repetition or series of acts (per Brett L.J. in smith v. Anderson, 50 L.J.Ch.52). Section 14 provides that no prosecution for any [illegible] the Ordinance shall be instituted except with the previous sanction of the Central or the Provincial Government or of an officer empowered by the Central or Provincial Government to grant such sanction. By expressly conferring the powers on the Central or Provincial Government to sanction prosecution, it appears that it was intended to exclude the Crown by implication. Moreover, the use of the word "person" in the definition of the term "dealer" in section 2(b) tends to support that inference (cf. R.L.A's opinion No.9675 dated 27-12-1945). It is thus clear that the Crown is not bound by the Hoarding and Profiteering Prevention Ordinance, 1943, The second question accordingly does not survive.

Sd/- P.N.MODS.
9/11/46.

Remembrancer of Legal Affairs.

U.R. to C.S.D. No. 7904, dated the 12th November 1946.

SM/10.7